IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

TODD E. HOINS, Appellant, v. STATE OF NEBRASKA DEPARTMENT OF INSURANCE, Appellee.	)	Case Number CI 01-1220 **ORDER**

This is an appeal from a Certificate of Adoption executed by the Director of the Nebraska Department of Insurance (the director) on March 15, 2001, adopting and accepting as the director's final order the recommendation of a hearing officer appointed by the director (the hearing officer) that the resident insurance agent license of Todd E. Hoins (Hoins) be revoked and immediately surrendered. The appeal is brought under the Nebraska Administrative Procedure Act. NEB. REV. STAT. §§ 84-901 through -920 (Reissue 1999); NEB. REV. STAT. § 44-4031 (Reissue 1998); and 210 NAC 26.009. Accordingly, review is conducted by the court, without a jury, de novo on the record submitted to the hearing officer. NEB. REV. STAT. § 84-917(5) (Reissue 1999).

In reviewing final administrative orders under the Administrative Procedure Act, the court functions not as a trial court but as an intermediate court of appeals. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). In reviewing the evidence, the court reaches conclusions independent of those reached by the hearing officer and adopted by the director and tries factual questions de novo. *Nebraska Dep't. of Correctional Services v. Hansen*, 238 Neb. 233, 238, 470 N.W.2d 170, 173 (1991). *Accord, Dep't. of Health v. Manor Care, Inc.*, 237 Neb.269, 271, 465 N.W.2d 764, 767 (1991).

FACTS

The hearing before the hearing officer was held on March 8, 2001. A review of the transcript, bill of exceptions and the exhibits received at the hearing reveals the following:

Hoins, licensed by the Department of Insurance (the department) as a resident insurance agent, is licensed to sell lines of life insurance and annuities and sickness, accident and health insurance.

On June 18, 1998, the department filed a petition against Hoins, alleging he had violated NEB. REV. STAT. §§ 48-4028(2) and (11) (Reissue 1998) (now Cum. Supp. 2000), relating to checks alleged to have been given to Hoins by Mary Mudd (Mudd) on or about June 21, 1995, and October 1, 1995, each in the amount of $3,300, as premium payments on Mudd's insurance policy with Old Line Life Insurance Company of America and that Hoins failed to forward the premium payments to Old Life Line. On July 9, 1998, Hoins filed an answer admitting and denying certain of the allegations contained in the petition.

On October 19, 2000, the department filed an amended petition, alleging a violation of NEB. REV. STAT. § 44-4028(8) (Reissue 1998) (now Cum. Supp. 2000). More specifically, the amended petition alleged that, on September 26, 2000, Hoins was convicted of a Class III felony, Theft by Deception. On January 29, 2001, Hoins filed an answer, denying such a conviction.

As noted, hearing on the amended petition and Hoins's answer was held before the hearing officer on March 8, 2001. At the request of Hoins, the rules of evidence applied to the hearing and all involved in the hearing were bound to those rules. *See*, NEB. REV. STAT. § 84-914(1) (Reissue 1999). The evidence presented to the hearing officer consisted of exhibits and a stipulation of the parties. The department offered Exhibits 1 through 4, which were received without objection. Hoins offered Exhibits 5 through 9. It appears Exhibits 5 through 8 were received without objection. The department objected to Exhibit 9; however, the hearing officer's reference to the exhibit in her findings of fact, conclusions of law and recommended order indicates the hearing officer considered Exhibit 9. Therefore, Exhibit 9 is considered received by the court. The parties' stipulation considered by the hearing officer was filed with the department on February 12, 2001.

With respect to the allegation in the amended petition that Hoins violated § 44-4028(8) (Reissue 1998) (now Cum. Supp. 2000), the evidence presented to the hearing officer shows the following: On May 23, 2000, Hoins, having waived a jury trial, appeared for trial before the District Court of Adams County, Nebraska, on two charges of theft by deception, each alleged to be a Class III felony. Evidence was adduced and the matter was taken under advisement. On or about September 26, Hoins was found guilty of theft by deception, with the amount taken being determined to be $3,300, on one count and not guilty on the second count. On October 19, a "Journal Entry and Order" to that effect was entered by the district court. A presentence investigation was ordered.

On January 9, 2001, Hoins appeared before the Adams County District Court for sentencing. Hoins was sentenced to probation for a period of 18 months. As part of his probation, Hoins was ordered to pay a fine of $5,000 and to perform 100 hours of community service. On February 7, Hoins filed a Notice of Appeal with the Adams County Clerk of the District Court and, when the hearing before the hearing officer was held on March 8, the criminal case was on appeal.

The hearing officer's findings of fact, conclusions of law and recommended order was issued on March 15, 2001. In the order, the hearing officer, after recounting the facts, recommended that Hoins's resident insurance agent license be revoked and be ordered surrendered immediately. On March 15, the director accepted the hearing officer's recommendation and ordered the immediate revocation and surrender of Hoins' resident insurance agent license. This appeal followed.

DISCUSSION

Hoins argues two points - that a felony conviction must be final before the department can take action against him and that, assuming the conviction of January 9, 2001, can be used by the department, standing alone it does not justify the revocation of his resident insurance license. Both issues revolve around NEB. REV. STAT. § 44-4028 (Cum. Supp. 2000), which provides, in relevant part, as follows:

> The director may revoke or suspend any person's license or place a licensed person on probation for such period as may be determined to be appropriate if, after notice to the licensed person and hearing, the director determines such person has:
>
> . . .
>
> (8) Been convicted of any felony or a Class I, II, or III misdemeanor evidencing that such person is not worthy of the public trust . . ..

I. The Director's Use of A Conviction Pending on Appeal

Hoins argues that his felony conviction must be final before the director can take action against him. Since he is appealing his felony conviction, Hoins's argument goes, the director cannot use the January 9, 2001, conviction as a basis for revoking his license, because the conviction is not final and, therefore, until affirmation of his conviction by the appellate court, it is not useable under § 44-4028(8).

It is undisputed that under certain circumstances "[a] criminal sentence is not considered a final judgment until the entry of a final mandate from an appellate court, if an appeal has been taken." *State v. White*, 256 Neb. 536, 542, 590 N.W.2d 867, 867-68 (1999) (citations omitted). For example, a previous conviction on appeal may not be used for enhancement purposes, because the conviction is not final and may be overturned by the appellate court. *State v. Estes*, 238 Neb. 692, 472 N.W.2d 214(1991). Also, where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, which, if the matter is on appeal, consists of the entry of a final mandate from the appellate court, the punishment is that provided by the amendatory act, unless specifically provided otherwise by the Legislature. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). *See also*, NEB. REV. STAT. § 27-609(5) (Reissue 1995) (the pendency of an appeal renders evidence of a conviction inadmissible for purposes of attacking a person's credibility).

Section 44-4028(8) provides, *inter alia*, that a person's license may be revoked if the licensee has been "convicted of any felony." The statute does not specifically require a "final conviction" against the licensee. Court decisions in other states have required

some degree of appellate review before an agency can take action; however, in those cases, the courts were addressing statutes which expressly required a *final* judgment or conviction. *See, e.g., Sutherland v. Arkansas Department of Insurance*, 250 Ark. 903, 467 S.W.2d 724 (1971) and *State v. Bridwell*, 592 P.2d 520 (Okla. 1979). No such specific statutory requirement exists under Nebraska law.

Interpretation of a statute presents a question of law. *In Re Interest of Joshua M., et al.* 256 Neb. 596, 591 N.W.2d 577 (1999). "In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense." *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 208, 602 N.W.2d 465, 472 (1999). "In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretations to ascertain the meaning of statutory words which are plain, direct, and unambiguous." *Gibbons v. Don Williams Roofing*, 261 Neb. 470, 471, 623 N.W.2d 662, 663 (2001 (quoting *In re Referral of Lower Platte South NRD*, 261 Neb. 90, 621 N.W.2d 299 (2001). "However, a statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous." *State ex rel. Stenberg v. Moore*, 258 Neb. at 208, 502 N.W.2d at 473 (citations omitted).

Clearly, § 44-4028(8), which is a civil statute, uses the sole term "conviction." If by "conviction" the Legislature had meant a conviction after all appellate avenues had been exhausted, then the Legislature was required to make such an interpretation evident by the statute's plain meaning. It did not do so.

Hoins was tried and found guilty and punishment was ordered. This clearly satisfies the statutory requirement of being "convicted of any felony" under § 44-4028(8).

The court finds the director was permitted to use Hoins's felony conviction of January 9, 2001, in determining whether action against his license was appropriate, even though the conviction was on appeal at the time of the director's decision.

II. Was Revocation Appropriate/Justified?

With respect to the sanction imposed in this case, the hearing officer's findings state as follows:

> [Hoins] was convicted of theft by deception in the amount of $3,300. The victim of the theft was an insurance client and the theft occurred during the course of [Hoins's] insurance business. The circumstances surrounding this conviction cause the Hearing Officer to believe that [Hoins's] actions not only evidence he is not worthy of public trust, but his actions also indicate that he has not demonstrated trustworthiness and competency to transact business in such a manner as to safeguard the public.

Since the director adopted the hearing officer's findings of fact, the court concludes that the director concurred that Hoins's felony conviction reflected he was not worthy of public trust and that he was not trustworthy or competent ". . . to transact business in such a manner as to safeguard the public."

Sanctions available to the director for being convicted of a felony are revocation, suspension or probation. NEB. REV. STAT. § 44-4028 (Cum. Supp. 2000). Obviously, revocation is the most severe sanction and should, therefore, be reserved for the most severe cases.

The problem with addressing the appropriateness of the sanction imposed by the director in this case is the almost total lack of evidence concerning the basis for the felony conviction of January 9, 2001. Virtually none of the facts relating to the conviction are contained within the record. This lack of specific evidence is acknowledged in the department's brief, wherein the department states, "[f]rom Exhibits 6 and 7, it *appears likely* that the victim was an insurance client of Mr. Hoins, but the record doesn't tell us much about the circumstances of the offense." (Emphasis added.) (In point of fact, it seems the hearing officer may very well not have even considered Exhibits 6 and 7, since, in her findings, she stated that the exhibits ". . . are, in essence, an attempt to re-try a criminal case and, as such, the exhibits are not relevant to the issue at hand.")

Although the court can speculate that "[t]he victim of the theft was an insurance client and the theft occurred during the course of [Hoins's] insurance business", it is not willing to do so and finds that the hearing officer's finding to that effect is not supported by competent evidence in the record. Since the record contains virtually no specific facts to explain the basis for Hoins having been found guilty of theft by deception, a Class III felony, which the court finds is a serious felony, the court looks to whether Hoins having been convicted of a felony, in and of itself, is sufficient to warrant revocation of his license.

As has been noted, § 44-4028 provides, in relevant part, that "[t]he director may revoke or suspend any person's license or place a licensed person on probation . . ., if the director determines such person has . . . (8) [b]een convicted of any felony . . .." The statute does not mandate revocation for a felony conviction. The court finds the record does not support a finding by the director that Hoins's resident insurance agent license should be revoked. Notwithstanding that determination, the court finds that a felony conviction, in and of itself, does warrant some type of sanction. That finding necessitates remanding this case to the director for further action disposition.

Remand, however, does not warrant allowing the director a second bite out of the proverbial apple (i.e., the presentation of additional evidence to determine an appropriate sanction). From the evidence presented before the hearing officer, the court finds that the appropriate sanction is probation for a period not to exceed three years under appropriate terms and conditions to be determined by the director.

CONCLUSION

The agency was correct in considering Hoins's felony conviction, even though an appeal was pending. Revocation of Hoins's resident insurance agent license, however, is not supported by the evidence.

The director's order that Hoins's resident insurance agent license be revoked should be, and hereby is, reversed and this case is remanded to the director to place Hoins on

probation for a period of time, not to exceed three years, and under the terms and conditions deemed appropriate by the director.

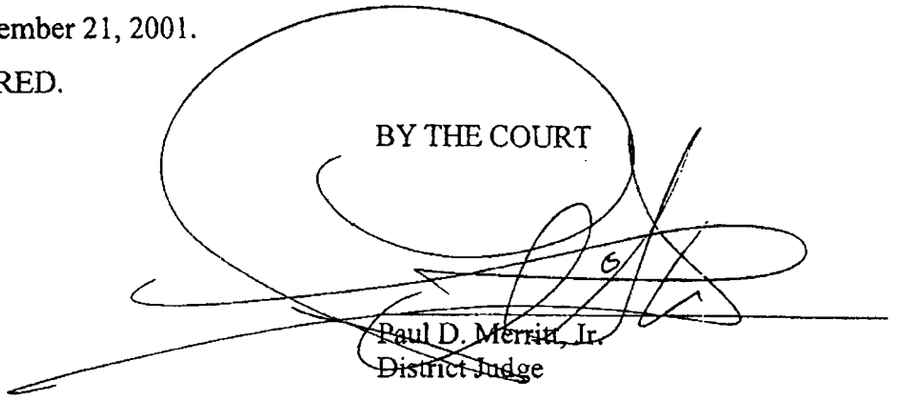
The costs of this action are taxed to the department.

A copy of this order is sent to counsel of record.

Dated November 21, 2001.

SO ORDERED.

BY THE COURT



Paul D. Merritt, Jr.
District Judge